Supreme Court, U.S.
FILED
MAY 29 1996
CLERK

Nos. 95-259 & 95-779

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

DARLENE WALTERS, AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

PETITIONERS,

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC., AND LEONARD BIEBER,

RESPONDENTS.

On Writ of Certiorari
to the United States Court of Appeals
For The Seventh Circuit

BRIEF FOR PETITIONER DARLENE WALTERS

CONSTANTINE JOHN GEKAS
Counsel of Record
ADRIANNE S. HARVITT
ALENNA K. BOLIN
HARVITT & GEKAS, LTD.
SUITE 2600
135 SOUTH LA SALLE STREET
CHICAGO, ILLINOIS 60603
(312) 726-4501

QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (1988 & Supp. V 1993), applies only to an "employer," in part defined in Section 701(b), 42 U.S.C. § 2000e(b) (1988), to be "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ."

The question presented is:

Whether that jurisdictional definition is satisfied when an employer maintains fifteen or more employees on the payroll for the requisite number of weeks even though fewer than fifteen employees report to work or are on paid leave on each day of each such week, as to which the courts of appeals are in direct conflict.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 2
- Introduction 2
- The District Court Action 3
- Metropolitan's Motion to Dismiss 4
- Discovery 5
- Metropolitan's Payroll Records 5
- The Stipulations 7
- The Spreadsheets 9
- Work Patterns 10
  - Midweek employee changes 10
  - Weekend hours 11
  - "Flextime" 11
  - Make-up hours 11
  - Part-time employees 12
  - Salaried employee 12
  - Workforce composition 12
- The Jurisdictional Result 12
- The Position of Ms. Walters and the EEOC 13

Page

- The District Court's Ruling 13
- The Ruling of the Court of Appeals 14

SUMMARY OF ARGUMENT 14

ARGUMENT 16

THE JURISDICTIONAL DEFINITION OF "EMPLOYER" IN TITLE VII SHOULD INCLUDE ALL EMPLOYEES ON THE PAYROLL FOR EACH WORKING DAY OF A WEEK. 16

1. Introduction. 16
2. The plain text of the statute supports the payroll method. 20
   - a. The plain text of the statute specifies that the existence of an employment relationship determines an employee's inclusion in the jurisdictional count. 20
   - b. Midweek employment changes, a common employment event, give full and complete meaning to the "for each working day" language. 22
   - c. Midweek employment changes were specifically mentioned in the legislative history of the FMLA and appear in the

Page

FMLA's implementing regulations. 24

d. The day-by-day method engrafts complicated additional factors onto the statute not even remotely suggested by the plain text of the phrase "for each working day." 25

e. The structural coherence of Title VII counsels in favor of the payroll method. . 26

f. The day-by-day method does not account for the realities of the changing American labor market. 27

g. The day-by-day method results in irrational distinctions between employees. 29

h. Conclusion. 30

3. If Section 701(b) is ambiguous, the legislative history supports the payroll method. 30

a. Introduction 30

b. The 1964 legislative history of the Title VII contains a specific explanation of the purpose and meaning of the phrase "for each working day." 31

Page

4. The day-by-day method is explicitly contrary to the general legislative purposes underlying Title VII -- that of extending Title VII's prohibitions as far as possible without imposing undue expense and burden on small businesses unable to bear that cost. 38

5. Whereas the payroll method is quick and easy to apply, the day-by-day method is difficult, cumbersome and time-consuming and results in irrational distinctions between employees. . . 40

a. The payroll method is easy and swift of application. 40

b. The day-by-day method is a morass. 41

c. The day-by-day method imposes greater costs on respondent employers because of the fee shifting provisions of Title VII. 43

6. The day-by-day method unsettles the construction of closely related anti-discrimination schemes which contain precisely the same phrase "for each working day." 44

7. The day-by-day method strongly detracts from Title VII's purpose of extending the

Page

prohibitions against employment discrimination as far as possible. 47

8. Petitioner Walters adopts the deference arguments of petitioner EEOC. 49

CONCLUSION 49

TABLE OF AUTHORITIES

Cases:

Cannon v. University of Chicago, 441 U.S. 677 (1979) 37
Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 20
Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 43
Cohen v. S.U.P.A. Inc., 814 F. Supp. 251 (N.D.N.Y. 1993) 18, 37
Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989) 47
Dumas v. Town of Mt. Vernon, 612 F.2d 974 (5th Cir. 1980) 18
Edwards v. Esau Investments, Inc., 66 Fair Empl. Prac. Cas. (BNA) 711 (D. Kan. 1994) 18
EEOC v. Argent Industries, Inc., 746 F. Supp. 705 (S.D. Ohio 1989) 17
EEOC v. Commercial Office Products Co., 486 U.S. 107 (1988) 48

Cases:

Page

EEOC v. Garden and Assocs., Ltd., 956 F.2d 842 (8th Cir. 1992) 17
Estate of Cowart v. Nicklos Drilling Co., 112 S. Ct. 2589 (1992). 20, 31
Evans v. Davie Truckers, Inc., 38 Fair Empl. Prac. Cas. (BNA) 1553 (M.D.N.C. 1984), *aff'd*, 769 F.2d 1012 (4th Cir. 1985) 18, 43
Gomez v. Toledo, 446 U.S. 635 (1980) 48
Good Samaritan Hospital v. Shalala, 113 S. Ct. 2151 (1993) 20
Gorman v. North Pittsburgh Oral Surgery Assocs., Ltd., 664 F. Supp. 212 (W.D. Pa. 1987) 18
Goudeau v. Dental Health Services, Inc., 901 F. Supp. 1139 (M.D. La. 1995) 17
Griggs v. Duke Power Co. 401 U.S. 424 (1970) 47
Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981) 40
Gustafson v. Alloyd Co., 115 S.Ct. 1061 (1995) 26
Holly Farms Corp. v. NLRB, 64 U.S.L.W. 4269 (April 23, 1996) 47
Hornick v. Borough of Duryea, 507 F. Supp. 1091 (M.D. Pa. 1980) 18
Lord v. Casco Bay Weekly, Inc., 789 F. Supp. 32 (D. Me. 1992) 17
Lynn v. JER Corp., 573 F. Supp. 17 (M.D. Tenn. 1983) 18
McGraw v. Warren County Oil Co., 707 F.2d 990 (8th Cir. 1983) 17
National Woodwork Manufacturers Ass'n v. NLRB, 386 U.S. 612 (1967) 37
Nationwide Mutual Insurance Co.

Cases: Page

v. Darden, 503 U.S. 318 (1992) 46, 47
Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968) 43
NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944) 47
Norman v. Levy, 756 F. Supp. 1060 (N.D. Ill. 1990), *supplemental opinion* 767 F. Supp. 1441 (N.D. Ill. 1991) 17, 18
Ozawa v. United States, 260 U.S. 178 (1922) 48
Pascutoi v. Washburn-McReavy Mortuary, Inc., 11 Fair Empl. Prac. Cas. (BNA) 1325 (D. Minn. 1975), *aff'd*, 566 F.2d 1178 (8th Cir. 1977) 18, 48
Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 46
Pedreyra v. Cornell Prescription Pharmacies, Inc., 465 F. Supp. 936 (D. Colo. 1979) 18, 21, 43, 48
Reith v. Swenson, 63 Fair Empl. Prac. Cas. (BNA) 885 (D. Kan. 1993) 18
Richardson v. Bedford Place Housing Phase I Assocs., 855 F. Supp. 366 (N.D. Ga. 1994) 17, 22
Schoenbaum v. Orange County Center for the Performing Arts, Inc., 677 F. Supp. 1036 (C.D.Cal. 1987) 17
Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) 37, 40
Shepherdson v. Local Union No. 401, 823 F. Supp. 1245 (E.D. Pa. 1993) 18
Simmons v. Vliets Farmers Coop., 55 Fair Empl. Prac. Cas. (BNA) 1341 (D. Kan. 1991) 18

Cases: Page

Thurber v. Jack Reilly's, Inc., 717 F.2d 633 (1st Cir. 1983) 17, 21, 30, 48
United States v. American Trucking Assns., 310 U.S. 534 (1940) 48
United States v. Thompson/Center Arms Co., 504 U.S. 505 (1992) 26
Vano v. Au, 1992 WL 175498 (W.D. Va. 1992) 18
Vera-Lozano v. International Broadcasting, 50 F.3d 67 (1st Cir. 1995) 17
Wilde v. County of Kandiyohi, 15 F.3d 103 (8th Cir. 1994) 19
Wright v. Kosciusko Medical Clinic, Inc., 791 F. Supp. 1327 (N.D. Ind. 1992) 17, 21
Zimmerman v. North American Signal Co., 704 F.2d 347 (7th Cir. 1983) 4, 17, 21, 22, 25, 26

Statutes and regulations:

Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (1988 & Supp. V 1993). 2
29 U.S.C. § 630(b) (1982) 5, 16, 44
Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(5)(A) (Supp. V 1993) 17, 44
An Act to Extend and Improve Unemployment Compensation, Pub. L. No. 83-767, ch. 1212, § 1, 68 Stat. 1130 (1954) 35
Civil Rights Act of 1964, Pub. L. 88-352, Title VII, 78 Stat. 253 (1964) 38
§ 701(a), 42 U.S.C. § 2000e(a) 16
§ 701(b), 42 U.S.C. § 2000e(b) ..... *passim*

Statutes and Regulations-Continued: Page

42 U.S.C. § 2000e(f) 16, 21
42 U.S.C. § 2000e-2 ..... 16, 26
42 U.S.C. § 2000e-3 ..... 16, 26
42 U.S.C. § 2000e-3(a) 3
42 U.S.C. § 2000e-5(f)(1) 3
42 U.S.C. § 2000e-5(k) 43
Employment Security Amendments of 1970,
Pub. L. No. 91-373, 84 Stat. 695 (1970) 35
Equal Employment Opportunity Act of 1972,
Pub. L. No. 92-261, § 2(2),
86 Stat. 103 (1972) 32
Family and Medical Leave Act of 1993,
29 U.S.C. § 2601 *et seq.* (Supp. V 1993) 2
29 U.S.C. § 2611(4)(A)(i) 16, 24, 44
Final Regulations Implementing Family
and Medical Leave Act, 60 Fed. Reg. 2179 (1995) . 25, 45
Internal Revenue Code of 1939, Pub. L. No. 76-1,
ch. 9, § 1607(a), 53 Stat. 1 (1939) 35
26 U.S.C. § 1607(a) (1952) 35
26 U.S.C. § 3304 (1954) 35
Internal Revenue Code of 1954, Pub. L. No. 83-591,
ch. 736, 68A Stat. 3 (1954) 35
26 U.S.C. § 3306(a) (Supp. II 1955) 35
26 U.S.C. § 3306(a) (1958) 34
Social Security Act Amendments of 1939,
Pub. L. No. 76-379, Title VI, § 614,
53 Stat. 1360 (1939) 35
Social Security Act of 1935, Pub. L. No. 74-271,
Title IX, § 907(a), 49 Stat. 620 (1935) 35
26 U.S.C. § 3306(a)(2) (1994). 35
29 C.F.R. § 825.105(d) 25, 45

Page

Other Authorities:

Congressional Materials:

110 Cong. Rec. (1964)
p. 11930 3
p. 12807 33
p. 13073 33
p. 13085 ..... 33, 39
p. 13087 ..... 34, 37, 39
p. 10389-93 39
p. 13092 39
p. 13093 37
p. 13310 37
p. 13327 38
p. 14239 38
p. 14511 38
118 Cong. Rec. (1972)
pp. 3170-72 32
pp. 7563-73 32
p. 7567 32
Amendment 898, 110 Cong. Rec. 12924-25 (1964) 33
Amendment No. 1052 to H.R. 5152 in the Nature
of a Substitute, 110 Cong. Rec. 11310 (1964) 37
Amendment No. 606, 110 Cong. Rec. 11461 (1964) 33
Amendment No. 656 to H.R. 7132 in the Nature
of a Substitute, 110 Cong. Rec. 11926 (1964) 32-33
H.R. Rep. No. 238, 92d Cong., 1st Sess. (1971) 32
H.R. 1746, 92d Cong., 1st Sess. (1971) 32
H.R. 7152, 88th Cong. 1st Sess. (1964) 31

Page

House Committee on Education and Labor,
Family and Medical Leave Act of 1993,
H. Rep. No. 8, pt. 1, 103d Cong.,
1st Sess. (1993) 24, 44-45
S. Rep. No. 3, 103d Cong., 1st Sess. (1993) 45
S. Rep. No. 415, 92 Cong., 1st Sess. (1971) 32
S. Rep. No. 681, 92d Cong., 2d Sess. (1972) 32

Miscellaneous:

Bureau of Census, U.S. Dep't. of Commerce,
Statistical Abstract of the United States - 1995
(September 1995) 27-28
Recent Case, *Employment Discrimination --*
Title VII -- Seventh Circuit Reaffirms a
Narrow Definition of "Employer" for the
Purposes of Title VII, 109 Harv. L. Rev. 675 (1996) . 26-27
Rev. Rul. 55-19, 1955-1 C.B. 496 (1955) 36

OPINIONS BELOW

The opinion of the court of appeals is reported at 60 F.3d 1225, and is reproduced in the Appendix to Ms. Walters' Petition for Certiorari (No. 95-259) at 1a-12a.

The decision and order of the district court are reported at 864 F. Supp. 71, and are reproduced in the same Appendix at 13a-19a.

JURISDICTION

The judgment of the Seventh Circuit was entered on July 18, 1995. Petitioner Darlene Walters filed a timely petition for a writ of certiorari on August 14, 1995 as Case No. 95-259.

On October 10, 1995, Justice Stevens granted the Solicitor General's application for an extension of time to file a petition for a writ of certiorari on behalf of the EEOC to and including November 15, 1995. On November 15, 1995, the Solicitor General filed that petition for a writ of certiorari on behalf of petitioner EEOC as Case No. 95-779.

On March 18, 1996, this Court granted both petitions and consolidated the two cases.

The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1) (1988).

STATUTES INVOLVED

This case involves the definition of "employer" in Section 701(b) of Title VII of the Civil Rights Act of 1964, Pub. L. 88-352, Title VII, § 701(b), 78 Stat. 241, 253 (1964), as amended by Pub. L. No. 92-261, § 2(2), 86 Stat. 103, 104-05 (1972), 42 U.S.C. § 2000e(b) (1988) as amended, which provides, in pertinent part:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . . (Pet. App. 20a).[1]

Other pertinent provisions of Title VII; the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (1988 & Supp. V 1993); and the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.* (Supp. V 1993), are reprinted at Pet. App. 20a-29a.

STATEMENT OF THE CASE

Introduction

Respondent Metropolitan Educational Enterprises, Inc. (Metropolitan) sells and finances encyclopedias, dictionaries and other items to retail customers throughout the United States. (Supp. Stips. ¶ 1, JA 17). Respondent Leonard Bieber is the company's sole shareholder, president and chief operating officer. (Answers to Walters' Cmplt. ¶ 3, R. 20 & 21; Stips. ¶ 9, JA 23).[2]

Operating from offices in Chicago, Illinois, Metropolitan

---

[1] The Appendix to Ms. Walters' Petition for Writ of Certiorari, filed in Case No. 95-259, is cited as "Pet. App. ___." Her Supplemental Appendix attached to her Supplemental Brief in support of her Petition is cited as "Supp. Pet. App. __." The Joint Appendix filed with this Brief is cited as "JA __." The original record is cited as "R. __."

[2] Both respondents will be referred to as "Metropolitan" unless the context requires separate reference.

transacts business nationwide through a sales force of independent "dealer's representatives" who tender sales contracts obtained from retail customers to Metropolitan. (Supp. Stips. ¶ 4, JA 17-18; Bieber Dep., JA 15-16).

From early 1986 until April 1990, petitioner Darlene Walters was employed by Metropolitan as a collector. (Answers to Walters' Cmplt. ¶ 8, R. 20 & 21).

In September 1989 she was denied a promotion to the position of credit manager. (Stips. ¶ 3, JA 21). Ms. Walters filed a charge of gender discrimination with the EEOC alleging that Metropolitan and Mr. Bieber had illegally denied her the promotion because of her gender and had hired a less qualified male to fill that position. (Answers to Walters' Cmplt. ¶ 6, R. 20 & 21).

On April 23, 1990, Metropolitan and Mr. Bieber discharged Ms. Walters. She thereupon filed another EEOC charge against Metropolitan for illegal retaliation. (Answers to Walters' Cmplt. ¶¶ 14-15, R. 20 & 21).

The District Court Action

Three years later, in April 1993, the EEOC filed suit against Metropolitan and Mr. Bieber alleging that the April 23, 1990 discharge had been illegal retaliation in violation of Section 704(a) of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-3(a) (1988). (EEOC Cmplt., R. 1).

Ms. Walters then intervened as a matter of right under 42 U.S.C. § 2000e-5(f)(1) (1988), asserting both gender discrimination because she had been denied a promotion and retaliation because she had been fired for filing an EEOC

charge. (R. 9-12).[3] She also asserted two claims under Illinois law -- one for retaliatory discharge and a second for breach of contract. (Walters' Cmplt., R. 12).

Separately answering both the EEOC's and Ms. Walters' complaints, Metropolitan and Mr. Bieber admitted that Ms. Walters had been discharged, but denied the Title VII discrimination and retaliation charges and Ms. Walters' state law claims. (Answers, R. 2, 3, 20 & 21). Metropolitan and Mr. Bieber admitted that Metropolitan was engaged in an industry affecting commerce but denied the complaints' jurisdictional allegations, especially that Metropolitan was an "employer" within the meaning of 42 U.S.C. §2000e(b). (*Id.*).

Metropolitan's Motion to Dismiss

Metropolitan moved to dismiss for lack of subject matter jurisdiction (R. 25), claiming under the rule of *Zimmerman v. North American Signal Co.*, 704 F.2d 347 (7th Cir. 1983), that it was not an "employer" under Title VII because in both 1989 and 1990 there were substantially less than twenty weeks in which fifteen or more employees had been present at work or on paid leave on each working day. (Dfs' Mem. in Supp. of Mot. to Dism., R. 26). In *Zimmerman*, which involved a nearly identical jurisdictional provision of the Age Discrimination in

---

[3] The EEOC had found no cause on Ms. Walters' original discrimination charge and issued a notice to that effect, also notifying her of her right to institute her own court action. (Walters' Cmplt. ¶ 7, R. 12). Pursuant to that notice, Ms. Walters had previously filed her own Title VII action in the same district court just before her "right to sue" period expired. She dismissed that action upon being granted leave to intervene in the EEOC's case. (Intervention Motion, R. 9; Order Granting Leave to Intervene, R. 10).

Employment Act of 1967 (ADEA), 29 U.S.C. § 630(b) (1982), the Seventh Circuit had held that hourly employees are to be counted toward the ADEA's jurisdictional minimum number of employees only on days they were either physically present at work or on paid leave. The test of *Zimmerman* has come to be known as the "day-by-day" counting method.

Attached to Metropolitan's Motion to Dismiss were two affidavits. One, by Mr. Bieber, explained his company's payroll system and documents. (JA 8-11). The second purported to tabulate the actual working and paid days off of all of Metropolitan's employees during 1989 and 1990. (Falahee Affidavit, R. 26, Ex. 5).

Based on that evidence, Metropolitan and Mr. Bieber asserted that there were no weeks in 1989 and only three weeks in 1990 in which Metropolitan had fifteen or more employees present at work or on paid leave on each working day, far short of the twenty week minimum.

Discovery

Discovery then focused on the complicated jurisdictional factual questions about the number of employees working for Metropolitan during 1989 and 1990, their employment status (salaried vs. hourly and full-time vs. part-time), their working schedules, including days actually worked, and their paid days off including holidays, vacations, sick days and personal days.

Metropolitan's Payroll Records

As part of discovery, Metropolitan produced a series of its payroll records like those described in Mr. Bieber's Affidavit. Two examples of those records are included in the Joint

Appendix. (JA 13A & 14A).[4]

Mr. Bieber's Affidavit explained that every bi-weekly pay period, Metropolitan prepared a "payroll worksheet" showing his salary information and the daily wage information for the hourly employees. That worksheet was forwarded to Metropolitan's automated payroll service, which in turn prepared and sent back a computer generated "payroll register" reflecting bi-weekly payroll information for all Metropolitan's employees on the payroll. (Bieber Affidavit, JA 8-11; Payroll Register and Worksheet, JA 13A & 14A).

Payroll period -- The original payroll register and Mr. Bieber's affidavit also showed that Metropolitan's bi-weekly payroll period ended on Thursday and started on Friday, and thus did not coincide with the beginning and end of a Monday to Friday calendar workweek. Friday was payday for that bi-weekly pay period. (Payroll Register, JA 13A: shows payroll "period ending 3/08/90," a Thursday, & "Date of Check 3/09/90," a Friday).

Thus, these simple records -- which were disclosed early in the case -- enabled the parties to readily ascertain the number of employees on Metropolitan's weekly payroll. However, as useful as the payroll records were, they did not reveal the central information required by the *Zimmerman* day-by-day method -- the daily work and leave history of Metropolitan's employees. Consequently, the parties were forced to examine

---

[4] As with all the payroll records first produced by Metropolitan, portions of those two examples, showing salary and other personal information, are blanked out. Eventually the district court ordered Metropolitan to produce unredacted copies of the payroll records, (3/4/94 Minute Order Granting in Part Motion to Compel, *etc.*, R. 32), but those unredacted copies are not included in the record.

even more basic payroll and time-keeping records.

The Stipulations

For the next ten months, the parties made a detailed examination of two years of Metropolitan's payroll registers, time cards, work diaries, and other timekeeping records. (Stips., JA 20-79; EEOC's Mem. of Law, R. 38, p. 14). Mr. Bieber and his part-time bookkeeper, Bernice Cunningham, were deposed. (EEOC's Mem. of Law, R. 38, p. 14). The district court granted the parties permission to investigate the merits if convenient during the discovery on jurisdiction, but they did not do so. (Walters' Mot. to Compel Discovery, *etc.*, R. 32, p. 2 n.2). Due to the complexity of the jurisdictional inquiry, the parties repeatedly requested and were granted extensions of time for completion of discovery and briefing on the jurisdictional issue. (R. 27-36).

The time and leave records examined by the parties were painstakingly reduced to weekly spreadsheet summaries showing in meticulous detail the precise working history of each employee for each day of each calendar week of 1990. The information from those summaries was then reduced to a narrative stipulation which can be found in the Joint Appendix followed by the spreadsheet summaries in their original form. (Stips. JA 20-27; Spreadsheets, JA 28-79).

The crucial stipulations pertaining to jurisdiction are simple:

> During 1990, Metropolitan had fifteen or more employees on its payroll on each working day of forty-seven calendar weeks, but
>
> During 1990, Metropolitan had fifteen or more employees physically present at work or on paid leave

on each working day of only nine weeks.[5]

(Stips. ¶¶ 11 & 12, JA 23-25).

The parties also stipulated to important subsidiary facts relevant to jurisdiction: that Mr. Bieber was Metropolitan's only salaried employee, that during 1990 Metropolitan had two regular part-time employees, and that all the workers listed on the spreadsheets, including Mr. Bieber and the two part-time workers, were "employees" within the meaning of Title VII. (Stips. ¶¶ 9-10, JA 23).

The parties stipulated that Metropolitan's regular working week and hours were Monday to Friday from 9:00 a.m. to 5:00 p.m., that Metropolitan was not open on weekends and that employees were not expected to work on Saturday, Sunday or eleven specified holidays during the year. (Stips. ¶¶ 6-7, JA 22). Thus, they stipulated that Metropolitan's "working days" were all weekdays (Monday to Friday) excluding those holidays. (*Id.* n.1, JA 22).

The parties stipulated that Metropolitan did not have fifteen or more employees in 1989, the year preceding Ms. Walters' termination. (Stips. ¶ 13, JA 26). The parties made no stipulations about 1988.

Finally, Supplemental Stipulations between Ms. Walters and respondents established that Metropolitan was not a small "mom and pop" operation but was indeed a company engaged in an industry affecting commerce with at least twenty

---

[5] These facts were different than those originally advanced by Metropolitan that there were only three weeks in 1990 in which the required fifteen or more employees were at work or on paid leave on each working day. (Dfs Mem. in Supp. of Mot. to Dism., R. 26 p. 3).

independent sales representatives (stipulated by the parties not to be Title VII employees) who sold Metropolitan's product lines by door to door solicitation throughout the country and who arranged for installment financing of those sales. (Supp. Stips., JA 17-19).

The Spreadsheets

The fifty-two spreadsheet summaries -- one for each calendar workweek of 1990 -- reveal not only the details of the 1990 work history of Metropolitan's employees, but also the cumbersome process of parsing those details to solve the jurisdictional puzzle. (Spreadsheets, JA 28-79).

The spreadsheet summaries depict every relevant fact about the employment status of all of Metropolitan's employees for each day of 1990 -- including weekends and holidays -- for each calendar week. They show the identity of the employees, whether their compensation was on a salaried or hourly basis and whether they worked full-time or part-time. Each spreadsheet shows for each day of each week, including Saturdays, Sundays and holidays, whether each employee was present at work and if so, how many hours each employee worked. Thus, for example, the spreadsheets depict an employee at work for seven hours on a particular day as "7.00R" -- i.e. seven hours of work receiving regular pay. (*Id.*).

For days off, the spreadsheets show whether an employee received holiday pay, vacation pay or sick pay. Thus, for example, several employees are shown as receiving seven hours of holiday pay -- "7.00 H" -- for New Years Day, Monday, January 1, 1990. (Calendar Week 1 Spreadsheet, JA 28).

Next, the spreadsheets show the total number of hours for which each employee was compensated in each week. Thus, for example, the spreadsheet for Calendar Week No. 1 shows

that Ms. Walters was compensated for a total of 26.25 hours -- seven holiday hours on New Years Day, five regular hours on Tuesday, January 2 (also a company holiday), one regular hour on Wednesday, January 3 (the first regular working day of the week), no hours on Thursday, January 4, eight regular hours on Friday, January 5 (the last working day of the week), and 5.25 regular hours on Saturday, January 6. (*Id.*).

The spreadsheets show the total number of employees working daily on each of Metropolitan's official working days. Thus, for example, in Calendar Week No. 1, there were three working days, Wednesday, Thursday and Friday, and there were fifteen employees at work on each of those days. (*Id.*)

Finally, and significantly, the spreadsheets show the total number of employees on Metropolitan's payroll for each such week. For example, for Calendar Week No. 1, there were a total of sixteen employees -- one salaried, two part-time and thirteen full-time on Metropolitan's payroll. (*Id.*). Of course, that tabulation of employees on the weekly payroll is merely repetitive of what Metropolitan's regular payroll records already revealed. *See* discussion *supra*, pp. 5-6.

Work Patterns

The spreadsheets reveal significant details about the work patterns of Metropolitan's employees.

Midweek employee changes -- First, the spreadsheets show that there were nine weeks in which employees either joined or left Metropolitan's employ during midweek, *i.e.* other than starting on Monday or leaving on Friday.

The most pertinent example of such a midweek employment change event was the termination of petitioner Darlene Walters on Monday, April 23, 1990, in Week 17. (JA

44).

Significantly, other of the midweek changes coincided with the beginning and end of Metropolitan's payroll period, as follows: Week 14 - J. Frawley departs on Monday. (JA 41); Week 17 - S. Davis starts on Thursday (JA 44); Week 24 - W. Sallee starts on Friday, the first day of a payroll period (JA 51); Week 26 - A. Hunter departs on Thursday, the last day of a payroll period (JA 53); Week 29 - J. Wilds departs on Thursday, the last day of a payroll period (JA 56); Week 34 - L. Thome-Steiner departs on Monday (JA 61); Week 40 - D. Gendron & S. Gibson start on Friday, the first day of a payroll period (JA 67); Week 50 - P. Slevin departs on Thursday, the last day of a payroll period (JA 77).

Weekend hours -- Second, the spreadsheets show that at least one full-time or part-time employee was at work on almost every weekend of the year, especially on Saturdays, even though Saturdays and Sundays were not official working days and employees were not expected to be at work on those days. (Weeks 1, 2, 4, 5, 7, 8, 9-11, 13-33, 35-52; JA 28, 29, 31, 32, 34, 35, 36-38, 40-60, 62-79).

"Flextime" -- The spreadsheets show that while some employees worked a "regular" Monday to Friday workweek, others worked a more flexible schedule such as four days a week, one with longer hours with one day off. In Week 5, for example, R. Reno worked all five days for a total of 34.75 hours while A. Hunter worked only four days, Monday through Thursday, for 34.25 hours. (JA 32).

Make-up hours -- Third, the spreadsheets show that sometimes employees would miss days during the week but work on holidays or weekends: Week 1 - D. Walters (JA 28); Week 14 - D. Walters (JA 41); Week 17 - R. Freeman (JA 44);

Week 21 - R. Freeman (JA 48); Week 26 - A. Hunter (JA 53); Week 46 - D. Gendron (JA 73); Week 47 - C. O'Connor (JA 74) & Week 52 - H. Gomez (JA 79).

Part-time employees -- The company had two part-time employees -- Bernice Cunningham and Margaret Finney. (Stips. ¶ 10, JA 23). Both were on the payroll in all fifty-two weeks. Ms. Finney often worked only a few hours only four days during the workweek and six or more hours on Saturdays. Thus, like the other employees she typically worked five days a week, missing one day during the workweek and working one weekend day. (*See e.g.* Weeks 4, 5 & 10; JA 31, 32 & 37).

Salaried employee-- Mr. Bieber was Metropolitan's only salaried employee. (JA ¶ 9, JA 23). Neither the spreadsheets nor the underlying payroll records reflect the days that Mr. Bieber was present or absent from work. Nor do they show any sick or vacation days on which he may have been absent from work.

Workforce composition -- Although the record does not explicitly state the gender or national origin of Metropolitan's employees, the spreadsheets show that there were apparently several women employees and two or three persons with Hispanic surnames. (*See e.g.* Week 1, JA 28).

The Jurisdictional Result

These stipulated facts determined the jurisdictional outcome: Metropolitan did not meet the jurisdictional minimum under the *Zimmerman* day-by-day method because there were only nine weeks in 1990 and no weeks in 1989 in which fifteen or more employees were physically at work or on paid leave on each working day.

The Position of Ms. Walters and the EEOC

However, the EEOC and Ms. Walters asserted that the proper method to determine jurisdiction was to count the number of employees on Metropolitan's weekly payroll, a method of counting that has come to be known as the "payroll method." Because there were forty-seven weeks in 1990 in which Metropolitan had at least fifteen employees on its payroll for each working day, Metropolitan would fall within the jurisdictional reach of Title VII under the payroll method.

The EEOC urged the district court to adopt the payroll method because it was supported by Title VII's legislative history, by judicial authority from other circuits, by the EEOC's own administrative construction of Section 2000e(b), and by subsequent Congressional developments. (EEOC's Opp. to Mot. to Dism., R. 38). In contrast, Ms. Walters conceded that *Zimmerman* controlled and compelled dismissal, but stated her intention to seek the Seventh Circuit's reconsideration of that case and the adoption of the payroll method for the same reasons advanced by the EEOC. (Walters' Mem. on Motion to Dismiss, R. 39, p. 1).

The District Court's Ruling

The district court granted Metropolitan's motion to dismiss on the basis of *Zimmerman* and the stipulated facts. (Pet. App. 18a-19a). The court reasoned that *Zimmerman*, an ADEA case, controlled this, a Title VII case, because of the common purpose of Title VII and the ADEA and their virtually identical definitions of "employer." (*Id.*) Therefore, the court declined to adopt the payroll method of counting employees for the reason that it could not "modify Seventh Circuit precedent." (*Id.* at 17a).

The Ruling of the Court of Appeals

A panel of the court of appeals affirmed, holding that the arguments of Ms. Walters and the EEOC were not sufficiently compelling to overcome the *stare decisis* effect of *Zimmerman*. (Pet. App. at 5a-6a, 11a). Thus, the court held that hourly and part-time workers are to be counted as Title VII employees only on the days they are physically present at work or on paid leave. (*Id.* at 3a-4a, 6a). The court concluded that *Zimmerman*, an ADEA case, controlled because Title VII's definition of employer was virtually identical to that in the ADEA. The court ruled that the day-by-day method was compelled by the statute's plain text and was the only method that gave meaning to the phrase "for each working day." The court rejected the arguments about the conflicting authority from other circuits, the legislative history of Title VII, the subsequent legislative developments and public policy. Judge Ripple concurred in the panel's decision but expressed his doubts about "the correctness of *Zimmerman*." (Pet. App. 11a). Urging a definitive resolution of the conflict, he concluded that

> The ambiguity of the present situation ought to be clarified. The scope of Title VII ought to be the same in Boston and New Orleans as it is in Chicago. (*Id.* at 12a).

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination, applies only to certain employers. It defines an employer as a "person . . . who has fifteen or more employees for each working day in each of twenty or more weeks in the current or preceding calendar year."

The plain text of that definition requires a count of all employees an employer "has . . . for each working day" of those weeks. The existence of the employment relationship is determinative. Nothing in the definition even remotely suggests that hourly employees are counted only for each working day they are physically present at work or on paid leave, the counting method approved by court of appeals herein.

The construction approved by the court of appeals engrafts unintended meanings onto the definition, destroys the internal coherence of Title VII and excludes from its coverage its intended beneficiaries. Moreover, that construction does not account for the changing realities of the American employment market.

If the statute is ambiguous, its legislative history commands that all employees be counted for each working day they are employees without reference to any other conditions or factors of employment. The Congressional debate clearly reinforces this interpretation.

Counting all employees on each day they are employed is a quick and easy way to determine jurisdiction. The contrary method approved by the court of appeals -- dependent as it is on additional factors such as presence at work, leave status, and method of compensation -- is complex, difficult, time-consuming and substantially burdensome, so much so that it defeats Title VII's essential legislative purposes of extending the prohibitions of employment discrimination as far as possible without imposing undue expense and burden on small businesses truly unable to bear those costs.

The judgment of the Seventh Circuit should be reversed and this case should be remanded for further proceedings.

ARGUMENT

THE JURISDICTIONAL DEFINITION OF "EMPLOYER" IN TITLE VII SHOULD INCLUDE ALL EMPLOYEES ON THE PAYROLL FOR EACH WORKING DAY OF A WEEK.

1. Introduction.

The question presented is how to determine the jurisdictional reach of the definition of "employer" in Title VII of the Civil Rights Act of 1964.

The prohibitions of Title VII -- invoked in this case against gender discrimination and retaliation -- apply only to an "employer." 42 U.S.C. §§ 2000e-2 & 2000e-3. ("It shall be an unlawful employment practice for an **employer** to. . . "). (Pet. App. 22a-23a) (emphasis added). Section 701(b) of Title VII, 42 U.S.C. § 2000e(b), states that

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . . (Pet. App. 20a).

Section 701(a) defines "person" as including "one or more individuals . . . [or] corporations . . . ." 42 U.S.C. § 2000e(a) (Pet. App. at 20a). In turn, Section 701(f) defines "employee" as "an individual employed by an employer . . . ." 42 U.S.C. § 2000e(f) (Pet. App. at 21a).

The jurisdictional definitions of other discrimination statutes are virtually identical. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 630(b) (1988 & Supp. V 1993) (ADEA) (Pet. App. 24a); the Family and Medical Leave Act of 1993, 29 U.S.C. § 2611(4)(A)(i) (Supp. V 1993)

(FMLA) (Pet. App. 28a); and Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12111(5)(A) (Supp. V 1993).

Two conflicting lines of decisions have arisen under Title VII and the ADEA regarding the proper method of determining which employees are within the jurisdictional definitions of employer. One line -- represented by the Seventh Circuit's decision herein and in *Zimmerman v. North American Signal Co.*, 704 F.2d 347 (7th Cir. 1983) (ADEA) -- adopts what is known as the "day-by-day method" that counts hourly-paid workers as employees for a working day only if physically at work or on paid leave on that day.[6] The other line -- represented by the First Circuit's decisions in *Vera-Lozano v. International Broadcasting*, 50 F.3d 67 (1st Cir. 1995) (Title VII) and *Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633 (1st Cir. 1983) (Title VII) -- adopts what has come to be known as the "payroll method" that counts all workers for each working day they are on the payroll whether or not present at work or on

---

[6] Other lower court decisions adopting or approving the day-by-day method are: *McGraw v. Warren County Oil Co.*, 707 F.2d 990 (8th Cir. 1983) (ADEA); *EEOC v. Garden and Assocs., Ltd.*, 956 F.2d 842 (8th Cir. 1992) (ADEA); *Goudeau v. Dental Health Services, Inc.*, 901 F. Supp. 1139, 1144-45 (M.D. La. 1995) (Title VII); *Richardson v. Bedford Place Housing Phase I Assocs.*, 855 F. Supp. 366 (N.D. Ga. 1994) (Title VII); *Wright v. Kosciusko Medical Clinic, Inc.*, 791 F. Supp. 1327, 1332 (N.D. Ind. 1992) (ADEA and Title VII) (following but criticizing *Zimmerman*); *Lord v. Casco Bay Weekly, Inc.*, 789 F. Supp. 32, 34-35 (D. Me. 1992) (ADEA); *Norman v. Levy*, 756 F. Supp. 1060, 1063-64 (N.D. Ill. 1990), *supplemental opinion* 767 F. Supp. 1441 (N.D. Ill. 1991) (Title VII); *EEOC v. Argent Industries, Inc.*, 746 F. Supp. 705, 708-09 (S.D. Ohio 1989) (ADEA); and *Schoenbaum v. Orange County Center for the Performing Arts, Inc.*, 677 F. Supp. 1036, 1039 (C.D.Cal. 1987) (ADEA).

paid leave.[7]

The jargon "day-by-day" and "payroll" merely summarize more complicated inquiries. Both methods first inquire into which workers are "employees," and, second, count the number of employees to see if the jurisdictional minimum is met. *See Norman v. Levy*, 756 F. Supp. at 1062 (jurisdictional test is two step, first, determining employee status, and, second, counting number of employees).

In some cases, the first step is complicated, involving a look at the terms and conditions of employment to determine whether a worker fulfills the definition of employee. But this case presents no issue about employee status because the parties

---

[7] Other decisions following the payroll method are: *Dumas v. Town of Mt. Vernon*, 612 F.2d 974, 979 n. 7 (5th Cir. 1980) (Title VII); *Edwards v. Esau Investments, Inc.*, 66 Fair Empl. Prac. Cas. (BNA) 711 (D. Kan. 1994) (Title VII); *Shepherdson v. Local Union No. 401*, 823 F. Supp. 1245, 1251-52 (E.D. Pa. 1993) (Title VII); *Reith v. Swenson*, 63 Fair Empl. Prac. Cas. (BNA) 885, 897 (D. Kan. 1993) (Title VII); *Cohen v. S.U.P.A. Inc.*, 814 F. Supp. 251, 254-56 (N.D.N.Y. 1993) (ADEA); *Vano v. Au*, 1992 WL 175498 at *2 (W.D. Va. 1992); *Simmons v. Vliets Farmers Coop.*, 55 Fair Empl. Prac. Cas. (BNA) 1341, 1342 (D. Kan. 1991); *Gorman v. North Pittsburgh Oral Surgery Assocs., Ltd.*, 664 F. Supp. 212, 214 (W.D. Pa. 1987) (ADEA); *Evans v. Davie Truckers, Inc.*, 38 Fair Empl. Prac. Cas. (BNA) 1553, 1554 (M.D.N.C. 1984) (Title VII), *aff'd*, 769 F.2d 1012, 1014 (4th Cir. 1985); *Lynn v. JER Corp.*, 573 F. Supp. 17, 20 (M.D. Tenn. 1983) (Title VII); *Hornick v. Borough of Duryea*, 507 F. Supp. 1091, 1098 (M.D. Pa. 1980) (Title VII); *Pedreyra v. Cornell Prescription Pharmacies, Inc.*, 465 F. Supp. 936, 941 (D. Colo. 1979) (Title VII); *Pascutoi v. Washburn-McReavy Mortuary, Inc.*, 11 Fair Empl. Prac. Cas. (BNA) 1325, 1327 (D. Minn. 1975) (Title VII), *aff'd*, 566 F.2d 1178 (8th Cir. 1977).

have stipulated that certain of Metropolitan's workers (its office personnel) were employees, and that the rest (its dealer's representatives) were not employees.[8] (Stips. ¶ 8, JA 22-23; Supp. Stips. ¶¶ 2-11, JA 17-19). Nor does this case present an issue about what a "working day" is. The parties have stipulated that Metropolitan's working days were Monday to Friday, 9:00 a.m. to 5:00 p.m. (Stips. ¶ 6, JA 22). The court of appeals did not consider that question and it is not within the scope of the grant of *certiorari*.

Instead, the issue in this case involves the second step -- counting employees toward the jurisdictional minimum "for each working day." The question is: are all employees counted "for each working day" they are on the payroll, or are hourly-paid employees counted only "for each working day" they are physically present at work or on paid leave?

The jurisdiction of the district court turns on the method used. The parties agreed that the jurisdictional minimum was not met in 1989. (Stips. ¶ 13, JA 26). As for 1990, the district court and court of appeals applied the day-by-day method and held that Metropolitan was not a Title VII employer and that there was no jurisdiction because there were only nine weeks during which at least fifteen workers were present at work or on paid leave for each working day. (Stips.¶11, JA 23-24). Had the courts below used the payroll method, however, there would have been jurisdiction by a comfortable margin because Metropolitan had fifteen or more employees on the payroll for each working day of **forty-seven** weeks of 1990. (Stips. ¶ 12, JA 24-25).

---

[8] Independent contractors are not Title VII employees. *See Wilde v. County of Kandiyohi*, 15 F.3d 103 (8th Cir. 1994).

Petitioner Darlene Walters respectfully urges that the payroll method is the only rational method of determining jurisdiction that is consistent with the text, legislative history and underlying public policy of Title VII and with sound judicial policy. The day-by-day method is completely unsupported in the statute's text or history, it engrafts a series of additional unintended and complicated meanings thereon, it is unduly cumbersome to apply and it drastically unsettles the construction of other important statutory schemes.

2. The plain text of the statute supports the payroll method.

Statutory construction begins and ends with the text of a statute if the meaning of that text is clear. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *see also Good Samaritan Hospital v. Shalala*, 113 S. Ct. 2151, 2157 (1993). When a statute speaks with clarity, judicial inquiry into its meaning is finished in all but the most extraordinary circumstances. *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992).

Petitioner Darlene Walters respectfully submits that the text of Title VII's definition of "employer" is crystal clear under the payroll method and that the task of statutory construction should begin and end with that method.

a. The plain text of the statute specifies that the existence of an employment relationship determines an employee's inclusion in the jurisdictional count.

The plain text of Section 701(b) defines "employer" as a person who "**has** fifteen or more employees **for each working day**" of the requisite number of weeks. (Pet. App. 20a) (emphasis added).

As several of the lower courts adopting the payroll method have noted, the word "**has**" connotes the existence of an employment relationship as determinative of a worker's inclusion within the jurisdictional count. *Thurber v. Jack Reilly's, Inc.* stressed that the statute and its legislative history focused on "the employment relationship," 717 F.2d at 634. *Pedreyra v. Cornell Prescription Pharmacies, Inc.* focused on the liberal construction of the term "employer" needed to fulfill the legislative purpose of eliminating discrimination and concluded that the proper counting method focuses "on the nature of the relationship of the employees." 465 F. Supp. at 941. *Wright v. Kosciusko Medical Clinic, Inc.* followed *Zimmerman*, but criticized it because the statutory definition covers any employee who that employer "has," again focusing on the existence of an employment relationship, not the days worked. 791 F. Supp. at 1331-32.

That focus is all the more emphasized by Title VII's broad definition of "employee" as "an individual employed by an employer." 42 U.S.C. § 2000e(f) (Pet. App. 21a). That definition is not limited in any fashion by type of employee, working hours, type of compensation, presence at work or leave status. *Pedreyra*, 465 F. Supp. at 941. (" [S]tatute itself does not limit the definition of employee by the number of hours worked each day.").

The payroll method focuses on just that factor -- the existence of an employment relationship between the employer and the employee.

Thus, as simple as it may seem, the jurisdictional determination can be made by counting the number of

"employees" a "person" "has" "for each working day" of each "calendar week" of a year. If that "person . . . has fifteen or more employees for each working day in each of twenty or more calendar weeks," then that person is an employer and is subject to the jurisdiction of the federal courts under Title VII.

The meaning of the statute's text is plain.

b. Midweek employment changes, a common employment event, give full and complete meaning to the "for each working day" language.

A number of courts have concluded that **only** the day-by-day method gives meaning to the phrase "for each working day." The Seventh Circuit in this case so concluded, ruling that the most natural interpretation of "for each working day" "looks to the number of employees physically present at work on each day of the week." 60 F.3d at 1228 (Pet. App. 6a). The *Zimmerman* court concluded that any other reading rendered that clause "meaningless, redundant, or superfluous." 704 F.2d at 353. *See also Richardson v. Bedford Place Housing Phase I Associates*, 855 F. Supp. 366, 370 (N.D. Ga. 1994) ("Any other interpretation would render the words 'for each working day' superfluous.").

However, petitioner Darlene Walters respectfully submits that the payroll method gives the phrase "for each working day" life and meaning by accounting for the realistic and common situation when an employee enters or leaves employment midweek. Thus, for example, when an employee enters employment on a Tuesday of a Monday to Friday workweek, that employee is not a Title VII employee for that week because he or she is not an employee "for each working day" of that week, not having been an employee on Monday. Similarly, an employee who leaves employment on a Thursday is not a Title

VII employee "for each working day" of that week, having been employed for only four of the five days of that week, not including Friday.

Such midweek employment changes are hardly improbable or isolated occurrences. Given the complexities of the business world and changing employment needs, common sense counsels that midweek employment changes are a regular part of employment patterns. It is surely customary that employees begin and end their employment at the beginning and end of payroll periods, which, for example, are often pegged to the first and last days of a month. The first and last days of such payroll periods -- *e.g.* from October 1st to 15th and October 16th to 31st -- do not always fall on Monday and Friday, as they do not this year.

Moreover, such midweek employment changes are not fanciful. They occurred **nine** times in this case. Ms. Walters was terminated on Monday, April 23, 1990, and thus was not an employee "for each working day" of her last work week, calendar week 17 of 1990. (Week 17 Spreadsheet, JA 44). In eight other weeks, other employees either started or left Metropolitan's employ during midweek, most at the beginning or end of its biweekly payroll period, which began on Friday and ended on Thursday of every other week. (*See* discussion *supra* pp. 10-11). Thus, construing the phrase "for each working day" to account for midweek employment changes gives the statute full meaning.

Nevertheless, without any real explanation, the court of appeals dismissed that construction as "a highly unlikely reading of the statute" because such midweek employment changes "are unlikely to occur with sufficient frequency to merit inclusion in a federal anti-discrimination statute." 60 F.3d at 1228. (Pet. App. 6a). The court's unstated assumption

seems to have been that employees almost always enter employment on Monday and terminate employment on Friday. Whatever the basis, the court's conclusion ignores the facts of this case, theoretical probabilities, and the infinite varieties of employment situations in the complex American employment market.

c. Midweek employment changes were specifically mentioned in the legislative history of the FMLA and appear in the FMLA's implementing regulations.

In fact, contrary to the court of appeals' conclusion, midweek employment changes are of sufficient importance to have merited specific Congressional and regulatory attention in the enactment and administration of a federal anti-discrimination statute.

As noted above, *supra*, p. 16, the FMLA's definition of employer includes precisely the same "for each working day" phrase as Title VII. 29 U.S.C. § 2611(4)(A)(i). (Pet. App. 28a). The House Report on the bill that eventually became the FMLA explicitly mentioned midweek employment changes:

> [A]n employee who begins employment, i.e., is added to the employer's payroll after the beginning of a workweek, or who terminates employment prior to the end of the workweek, will **not** count as being employed on "each working day" of such week.

House Committee on Education and Labor, Family and Medical Leave Act of 1993, H.R. Rep. No. 8, pt. 1, 103d Cong., 1st Sess. at 34 (1993) (emphasis added).

Moreover, the Department of Labor's regulations implementing the FMLA explicitly provide the same

definitional restriction for such midweek employment changes:

> An employee who does not begin to work for an employer until after the first working day of a calendar week, or who terminates employment before the last working day of a calendar week, is not considered employed on each working day of that calendar week.

Final Regulations Implementing Family and Medical Leave Act, 60 Fed. Reg. 2179, 2240 (1995) (to be codified at 29 C.F.R. §825.105(d)) (Supp. Pet. App. 2a).

Thus, midweek employment changes are of sufficient importance to be included in a federal anti-discrimination statute and the implementing regulations.

Thus, the court of appeals erred in concluding that only the day-by-day method gives meaning to the phrase "for each working day." In fact, the payroll method gives full meaning to the phrase and recognizes common practical realities of the American employment market.

d. The day-by-day method engrafts complicated additional factors onto the statute not even remotely suggested by the plain text of the phrase "for each working day."

Next, whereas the payroll method is simple in concept and brings no additional gloss or meaning to the definition of employer, the day-by-day method engrafts a complicated set of additional factors onto the phrase "for each working day."

For example, an employee's payroll status becomes an essential inquiry because salaried workers are counted for each working day whether present at work or not. *Zimmerman*, 704 F.2d at 353. Leave status of hourly workers requires

examination because hourly employees are counted only if their leave is paid. *Id.* Indeed, by reserving ruling on the questions raised by the day-by-day method -- how to count "hourly workers on paid leave," how to count "hourly paid workers on non-paid standby status," and how to count "salaried workers" -- even *Zimmerman* recognized that method's inherent additional complexities. 704 F.2d at 354 n. 6.

Therefore, it is difficult to understand how the plain text of the statute invokes a counting method that imports such significant and new concepts and facts into the phrase "for each working day."

e. The structural coherence of Title VII counsels in favor of the payroll method.

Next, the day-by-day method introduces a serious structural inconsistency into Title VII by excluding from the jurisdictional count employees who are explicitly protected by Title VII's prohibitions.

Title VII prohibits discrimination and retaliation against "individuals" and "employees." 42 U.S.C. §§ 2000e-2 & 2000e-3 (Pet. App. 22a-23a). Thus, all employees -- full-time or part-time, salaried or hourly, present or absent -- are protected from discrimination.

"[N]ormal canons of construction caution us to read [a] statute as a whole, and, unless there is good reason, to adopt a consistent interpretation of a term used in more than one place within a statute." *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 512 n. 5 (1992); *Gustafson v. Alloyd Co.*, 115 S.Ct. 1061, 1066 (1995) (A term should be construed consistently throughout a statute.). *See also* Recent Case, *Employment Discrimination -- Title VII -- Seventh Circuit Reaffirms a Narrow Definition of "Employer" for the Purposes*

of Title VII, 109 Harv. L. Rev. 675 (1996).

In contrast, the payroll method is consistent and inclusive in counting employees, the workers protected under Title VII, for each working day they are employed.

Moreover, it makes no sense to exclude from the jurisdictional count the very persons whom Title VII was intended to protect. This is especially so when, as petitioner will demonstrate in the next section, those persons comprise an ever increasing proportion of the American workforce.

f. The day-by-day method does not account for the realities of the changing American labor market.

Next, contrary to the payroll method, the day-by-day method encrusts Title VII in a fixed view of the nature of employment in America -- in which workers go to the premises of the employer on Monday to Friday from 9:00 a.m. to 5:00 p.m. In fact, the American work environment is drastically changing so that the work patterns of employees are different than they were thirty years ago when Title VII was enacted. This case presents a snapshot of some of those changes.

First and foremost, women comprise a significant proportion of Metropolitan's workforce. That fact mirrors the economy in general. In 1970, there were 31.5 million women in the civilian labor force -- a participation rate of 43.3 per cent of American women. By 1994, that number had increased to 60.2 million women -- and their participation rate had increased to 58.8 per cent of women. Bureau of Census, *Table No. 627 - Civilian Labor Force and Participation Rates, With Projections: 1970 to 2005*, Statistical Abstract of the United States - 1995 at 405 (September 1995).

From 1960 to 1994, the participation rate of married women, broken down by age groups changed as follows:

Year	16-19	20-24	25-34	35-44	45-64	65+	Total
1960	27.2%	31.7%	28.8%	37.2%	36.0%	6.7%	31.9%
1980	49.3%	61.4%	58.8%	61.8%	46.9%	7.3%	49.8%
1994	48.9%	65.8%	71.6%	75.8%	61.9%	9.4%	60.7%

Id. at p. 405: *Table No. 636 - Labor Force Participation Rates, by Marital Status, Sex and Age: 1960 to 1994.*

Surely, this demonstrates the increased participation in the American workforce by one subset of Title VII's intended beneficiaries.

In addition, this case presents a picture of the changing nature of work schedules in our economy. Metropolitan's employees work flexible schedules with different hours on different days. There is flextime, part-time, and weekend work.

Those case-specific facts are reflected in national workforce statistics. For example, in 1985, the distribution of workers with flexible schedules was 12.3 per cent of a 73.4 million person workforce. By 1991, the distribution had increased to 15.1 per cent of an 80.45 million person workforce. *Id.* at p. 410: *Table No. 647 - Workers on Flexible and Shift Schedules: 1985 and 1991.*

There is no need for a more detailed statistical picture of the changed employment patternns in the American economy because the central point in this regard is a simple one: the construction of Title VII should not be encased in a outdated preconception of the American economy and working conditions. The analysis of the court of appeals in this case, and the day-by-day method in general, have just that undesirable effect. That construction excludes Title VII's

intended beneficiaries from its protections in an era when those beneficiaries are entering the American workforce in droves, a wholly undesirable result.

The payroll method has none of these unfortunate consequences. It looks only to one thing -- employment status -- without any unnecessary or outdated criteria about working conditions. It is flexible enough to cover all workers who enter the workforce. This is the type of flexibility that a remedial anti-discrimination statute should have.

g. The day-by-day method results in irrational distinctions between employees.

Furthermore, the day-by-day method results in irrational and arbitrary distinctions between workers. For example, an hourly worker who works a "regular" workday five days a week, Monday through Friday, is counted on all five days whereas an hourly worker who works longer hours only four days a week, Monday to Thursday, for the same total weekly hours is counted for only those four days. That pattern -- "flextime" -- exists in this case. (*See* discussion *supra*, p. 11).

Another example: the part-time worker who works four weekdays and one weekend day is not counted as an employee for the entire week. That pattern also exists in this case -- M. Finney, a part-time employee, often worked four days during the workweek and then on Saturday. (*See* discussion *supra*, pp. 11-12). In contrast, under both methods, a part-time employee who works only one hour a day all five days of the regular workweek would be counted for the whole week.

Yet another example: Respondent Bieber was a salaried employee and was thus counted for each working day without reference to his presence at work or leave status. (*See* discussion supra, p. 12). There seems to be no principled

reason to treat such salaried employees different from a full-time hourly employee.

Beside their obvious irrationality, these differences are the more suspect because nowhere does the statute mention, or distinguish between, employees on the basis of any of the factors needed to apply the day-by-day method.

h. Conclusion.

For all these reasons, the plain text of the statute requires that the payroll method be used to determine jurisdiction. The resolution of this case should begin and end with that rationale.

3. If Section 701(b) is ambiguous, the legislative history supports the payroll method.

a. Introduction

The distinguished Seventh Circuit panels in this case and in *Zimmerman* reached conclusions directly opposite to that of the distinguished First Circuit panel in *Thurber* which included then Circuit Judge, now Justice, Breyer. 717 F.2d at 633. That conflict is repeated in decisions of other circuit and district courts, several disagreeing about the meaning of the statute's "plain text." (*See* cases cited *supra*, notes 6 & 7, p. 17 & 18). Perhaps that conflict alone suggests that the statute is ambiguous, justifying a look at its legislative history.

Moreover, the court below herein seemed to concede both that the statute was ambiguous and that the legislative history supported the payroll method. At one point, the court "agree[d] that the statute could have been worded more clearly." 60 F.3d at 1228 (Pet. App. 6a). At another point, the court conceded that certain remarks in the legislative debate were consistent

with the payroll method. Yet, the court decided the case on the statute's plain text and concluded that the legislative history of Title VII was "too confused and chaotic to be of much use." 60 F.3d at 1227 n. 3 (Pet. App. 5a). Perhaps these are extraordinary circumstances sufficient to justify examination of the legislative history. *Estate of Cowart*, 112 S. Ct. at 2594 (In plain text case court examines legislative history only in most extraordinary circumstances.).

Petitioner Darlene Walters respectfully submits that the legislative history of the statutory language at issue is crystal clear in focusing on the existence of an employment relationship as determinative of an employee's inclusion in the jurisdictional count. Only the payroll method is true to that legislative history.

b. The 1964 legislative history of the Title VII contains a specific explanation of the purpose and meaning of the phrase "for each working day."

First, there is a specific legislative history about the definition of "employer" and the phrase "for each working day."

That phrase originated in the Senate which was considering a civil rights bill passed by the House of Representatives. The Title VII of that House-passed bill defined employer as a person with twenty-five or more employees, but did not include the "for each working day" language now in the statute. H.R. 7152, 88th Cong., 1st Sess. (1964). That language originated in a Senate substitute for Title VII, was specifically debated on the Senate floor, was approved by a large majority of the Senate, and thereafter survived without change into enactment as law.

Eight years later, Congress reduced the jurisdictional

minimum to the current fifteen, but the neither the text nor the legislative history of that change enlighten the meaning of the phrase "for each working day." Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(2), 86 Stat. 103, 104-05 (1972).[9]

A brief synopsis of the 1964 Senate deliberations preceding the enactment of Title VII is as follows:

It is an understatement to say that this civil rights legislation was controversial. Once in the Senate it drew the earnest legislative attention of the Senate leaders, Majority Leader Mike Mansfield and Minority Leader Everett McKinley Dirksen.

After the passage of several weeks, Senators Mansfield and Dirksen jointly introduced a compromise substitute to the House Bill. Amendment No. 656 to H.R. 7152 in the Nature of a Substitute, *reprinted in full at* 110 Cong. Rec. 11926 (May 26, 1964). The ensuing Senate debate focused on Amendment

---

[9] Both the House and Senate bills that formed the basis of the 1972 amendments proposed to lower the minimum to eight employees. *See* H.R. Rep. No. 238, 92d Cong., 1st Sess. 26 (1971), and S. Rep. No. 415, 92 Cong., 1st Sess. 8-9 (1971). In the House that change was stricken entirely. *See* H.R. 1746, 92d Cong., 1st Sess. (1971) as passed by the House on September 17, 1971. The Senate compromised on a minimum of fifteen. *See* Senate debates, 118 Cong. Rec. 3170-72 (February 8, 1972). The Conference then agreed to the fifteen employee minimum. *See* Conference Report, S. Rep. No. 681, 92d Cong. 2d Sess. 15 (1972), and House debates adopting Conference approved bill, 118 Cong. Rec. 7563-73 (March 8, 1972), *esp.* remarks of Congressman Erlenborn at 118 Cong. Rec. 7567. Through all that activity, the meaning of "for each working day" was not discussed.

656, the Mansfield-Dirksen Substitute.

The compromise substitute contained the precise definition of "employer" that ended up in the statute, including the phrase "for each working day." *Id.* at 11930. On June 5, 1964, Senator Dirksen inserted into the Congressional Record an "annotated" copy of the House-passed bill showing the changes proposed by the Substitute. That annotated copy shows the addition of the phrase "for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 110 Cong. Rec. 12807, 12812 (June 5, 1964).

On June 9, 1964, Senator Ervin, acting for Title VII's opponents, moved to strike Title VII in its entirety. 110 Cong. Rec. 13073-74 (June 9, 1964); Amendment 898, *reprinted in full at* 110 Cong. Rec. 12924-25 (June 8, 1964). The Senate soundly rejected that effort by a vote of 64 to 33. 110 Cong. Rec. 13085 (June 9, 1964).

Immediately thereafter, Senator Cotton of New Hampshire moved to raise the jurisdictional minimum to one hundred or more employees. Amendment No. 606, *reprinted in full at* 110 Cong. Rec. 11461 (May 20, 1964). See Remarks of Senator Cotton and ensuing debate, 110 Cong. Rec. 13085-93 (June 9, 1964).

In the course of that debate, and in opposition to the Cotton amendment, Minority Leader Dirksen specifically discussed the phrase "for each working day." After stating that he had initially been concerned with the "far-reaching character" of Title VII as contained in the House Bill, he explained that

> [a]ccordingly, the House bill was modified in some particulars. In the first place, we undertook to provide for seasonal workers, by taking the language out of the Unemployment Compensation Act, to the effect

> that the definition of the term "employer" would apply to 25 or more **who were employees for each working day**, in each of 20 or more calendar weeks, in the current or preceding calendar year. **We went through that matter with the Department of Labor and others, in order to make sure that we were on good ground.** 110 Cong. Rec. 13087 (1964) (emphasis added).

While Senator Dirksen's remarks were targeted at seasonal employees, the clear implications of what he said go much farther because they explicitly show his intention to focus on the existence of an employment relationship as determinative of the jurisdictional count. To repeat his words more pointedly: "the definition . . . would apply to 25 or more **who were employees on each working day** . . . ." (emphasis added). It is the status of workers as employees that is central, not their presence at work. Indeed, Senator Dirksen's remarks neither mention nor even remotely allude to presence at work.

Moreover, because of the statutory and interpretive history of the Unemployment Compensation Act (UCA), Senator Dirksen's remarks about the UCA and about his consultation with the Department of Labor "and others" even more strongly show his focus on the employment relationship as the determinant of coverage.

In 1964, the UCA's definition of "employer" read as follows: "[T]he term 'employer' does not include any person unless on each of some 20 days during the taxable year, each day being in a different calendar week, the total number of individuals who were **employed by him in employment** for some portion of the day (whether or not at the same moment of time) was four or more." 26 U.S.C. § 3306(a) (1958) (emphasis added).

In 1955, the Internal Revenue Service ("IRS") had construed an earlier version of that definition which differed slightly from the above quoted form in that the minimum number of employees was eight. 26 U.S.C. § 1607(a) (1952).[10] The IRS ruled that a worker is counted as an employee under the UCA for each working day the employment relationship

---

[10] The definition was originally enacted in the Social Security Act of 1935 and included the following language ". . . the total number of individuals who were **in his employ** for some portion of the day (whether or not at the same moment of time) was eight or more." Social Security Act of 1935, Pub. L. No. 74-271, Title IX, § 907(a), 49 Stat. 620, 642 (1935) (emphasis added).

In early 1939, the original definition was codified as 26 U.S.C. § 1607(a) as part of the Internal Revenue Code of 1939. Pub. L. No. 76-1, ch. 2, § 1607(a), 53 Stat. 1, 187 (February 10, 1939). Later that year, the language "in his employ" was changed to "employed by him in employment." Social Security Act Amendments of 1939, Pub. L. No. 76-379, title VI, § 614, 53 Stat. 1360, 1392 (August 10, 1939).

In August 1954, the definition was recodified as 26 U.S.C. § 3306(a). Internal Revenue Code of 1954, Pub. L. No. 83-591, ch. 736, 68A Stat. 3, 447 (1954). On September 1, 1954, the definition was amended to reduce the minimum number of employees to four, effective January 1, 1956. An Act to Extend and Improve Unemployment Compensation, Pub. L. No. 83-767, ch. 1212, §1, 68 Stat. 1130 (1954), *codified at* 26 U.S.C. § 3306(a) (Supp. II 1955). That was the form of the definition in 1964 when the Senate adapted it into Title VII.

In 1970, the pertinent part of the definition was amended into its current, slightly different, reconfigured form in which the number of employees was also reduced to one. Employment Security Amendments of 1970, Pub. L. No. 91-373, 84 Stat. 695, 696 (1970), *currently codified at* 26 U.S.C. § 3306(a)(2) (1994).

exists, regardless of whether the employee reports to work each day. Rev. Rul. 55-19, 1955-1 C.B. 496 (1955).

The full text of that IRS Revenue Ruling is included in the Joint Appendix at JA 80 to JA 85. It seems written with the instant case in mind. It dealt explicitly with the "method to be used in arriving at a weekly count of employees for purposes of determining liability of an employer under section 1607(a) of the Federal Unemployment Tax Act (subchapter C, chapter 9, Internal Revenue Code of 1939) under certain conditions, particularly where part-time employees are involved." 1955-1 C.B. 496-97. (JA 80).

As the IRS ruling summarized the matter, neither the method or the frequency of payment, nor an employee's presence at work, nor an employee's "regular," "permanent" or "part-time" status determines the employee's inclusion in the count. Instead: "The existence of an employment relationship is the controlling factor." *Id.* at 498. (JA 83). Thus, explained the IRS, regular employees who are granted a day or two off per week because of long working hours are counted as employees during the entire week because the employer-employee relationship does not terminate on those days off.

> If the employer-employee relationship exists, it is immaterial that the employee performs no physical service for the employer on certain days of the week. *Id* at 497. (JA 81).

This Ruling could not be clearer.

Moreover, the explicit language of the UCA through all its changes (from the original "individuals . . . in his employ" to "individuals . . . employed by him in employment," *supra* note 10 p. 35) show the Congressional focus on the employment relationship as the determinant of coverage.

Senator Dirksen and the other drafters of his compromise substitute were specifically aware of the text of the UCA and that long standing IRS ruling. We know this because he as much as said so in his remarks about "taking the language out of the [UCA]" and about consultation with the "Department of Labor and others, in order to make sure that we were on good ground." 110 Cong. Rec. at 13087. At the very least, as the district court in *Cohen v. S.U.P.A. Inc.* concluded, it is appropriate to assume that Congress intended that Title VII's definition be interpreted the same as the UCA's definition on which it was modeled. 814 F. Supp. at 255-56 (citing *Cannon v. University of Chicago*, 441 U.S. 677, 696-98 (1979)).

This is the most powerful and persuasive legislative history imaginable -- remarks in floor debate by the Minority Leader of the Senate, a chief co-sponsor of a compromise bill containing language that was eventually enacted into law without change. He spoke directly to the language at issue and his position was supported by a large majority of the Senate. *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 640 (1967) (quoting *Schwegmann Bros. v. Calvert Distillers Corp.* 341 U.S. 384, 394-95 (1951) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt.")).

The power of this legislative history is reflected in the Senate's overwhelming rejection of Senator Cotton's amendment by a vote of 63 to 34. 110 Cong. Rec. 13093 (June 9, 1964). The next day, Senator Dirksen introduced a revised substitute amendment that incorporated other changes made by the Senate but which did not alter his proposed definition of employer. Amendment No. 1052, *reprinted in full at* 110 Cong. Rec. 13310, 13314 (June 10, 1964). Almost immediately thereafter, the Senate voted cloture by a vote of 71-29. 110

Cong. Rec. 13327 (June 10, 1964). On June 17, 1964, the Senate adopted the Mansfield-Dirksen Substitute by a vote of 76-18. 110 Cong. Rec. 14239 (June 17, 1964). On June 19, 1964, the Senate approved the House Bill as amended by the Substitute by a vote of 73-27 and sent it to Conference. 110 Cong. Rec. 14511 (June 19, 1964).

That definition of "employer" was ultimately enacted in the precise form discussed by Senator Dirksen. Pub. L. 88-352, Title VII, § 701(b), 78 Stat. 241, 253 (1964).

Thus, the legislative history of Title VII pointedly and strongly shows the legislative intent to focus on the employment relationship in counting employees toward the jurisdictional minimum. In turn, this requires the use of the payroll method.

4. The day-by-day method is explicitly contrary to the general legislative purposes underlying Title VII -- that of extending Title VII's prohibitions as far as possible without imposing undue expense and burden on small businesses unable to bear that cost.

That Congress intended to limit the reach of Title VII is apparent from the textual definition of employer, limited as it was to twenty-five employees. It is the purpose behind that limitation that bears examination.

Petitioner Darlene Walters respectfully submits that only the payroll method is consistent with the general tenor of Title VII's legislative history showing that Congress intended to reconcile important competing purposes -- extending the protections of Title VII to the broadest possible number of businesses and employees in such a manner as to ensure easy

enforcement, all without imposing its attendant costs on small entities truly unable to withstand those costs financially.

Three legislative concerns emerge from the debates on Title VII. The first and foremost was the threat to the associational rights of small business owners. Senator Cotton argued that for small businesses, "the personal relationship is predominant" and that a small businessman should "be allowed to pick and choose employees congenial to himself." 110 Cong. Rec. 13085-86 (June 9, 1964) (remarks of Senator Cotton). A second theme advanced by Senator Cotton was that small entities should not be burdened with the costs associated with litigating discrimination claims. *Id.* at 13092. His third concern was "the problem of enforcement" -- that if the EEOC was required to investigate every complaint against small businesses across the country "enforcement would become well nigh impossible; and the enforcement which did occur would be found to be spotty." *Id.* at 13085.

The proponents of Title VII argued that it had been molded to reach the largest number of employees and that raising the employee minimum to 100 would emasculate it. *Id.* at 13087 & 10389 (remarks of Senators Dirksen and Humphrey). They argued that the costs of litigating discrimination complaints was justified by the principle of eradicating discrimination, "a price one has to pay to be free." *Id.* at 13092 (remarks of Senator Morse). Finally, they argued that the concerns about enforcement were dealt with by the mechanism of apportioning investigative and conciliative responsibility between the state and federal equal employment agencies. *Id.* at 13087 & 13089 (remarks of Senators Dirksen and Saltonstall).

Of course, Senator Cotton lost. The Senate overwhelmingly rejected his concerns about the personal relationship, problems of enforcement and the costs of defense.

And, of course, " '[t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation.' " *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 483 (1981), (quoting *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951)).

Yet, reference to Senator Cotton's concerns is useful because they show that it is the day-by-day method that fulfills all his worse fears and objections. Indeed, as petitioner will demonstrate in the next section, the day-by-day method flushes the specter of Senator Cotton's parade of horribles with new life contrary to the explicit wishes of the great majority of Senators who approved Title VII.

5. Whereas the payroll method is quick and easy to apply, the day-by-day method is difficult, cumbersome and time-consuming and results in irrational distinctions between employees.

a. The payroll method is easy and swift of application.

The payroll method is quick and easy to apply.

In this case, Metropolitan prepared biweekly payroll records for its employees which it sent to an outside payroll service for processing. Examples of Metropolitan's payroll records are included in the Joint Appendix at JA 13A & 14A. They are simple and easy to read. They show that Metropolitan employed fifteen employees for the payroll period ending March 9, 1990, a Thursday. *Id.* It takes seconds to count the fifteen employees. With the payroll registers for the other weeks of the year, the count of employees consumes no more than a couple of hours, even though Metropolitan's payroll period did not coincide with the calendar week. No further agonizing tabulations or counts are required.

In general, the payroll method will be easy to apply in virtually all cases. The jurisdictional count can be made quickly, based on regular payroll records, already required by the income, payroll, unemployment and social security tax reporting and withholding obligations imposed on employers by federal, and most state, tax laws.

b. The day-by-day method is a morass.

This Court has received this case with a streamlined record, based in large measure on simple stipulations. Central to those stipulations are the attractive spreadsheets in shaded columnar format showing the work history of every one of Metropolitan's employees in 1990. (Stips. JA 28-79). The ready format of these spreadsheets should not conceal the difficulties of the day-by-day method. In fact, the work required by the day-by-day method was excruciating.

To reach those Stipulations, the parties were required to examine daily time cards and other payroll records for between thirteen and seventeen full-time and part-time hourly employees for every day of 1990 to determine their employee status (full-time or part-time), presence at work, leave status (paid or unpaid) and the other cumbersome attributes emphasized by the day-by day method.

In theory, the minimum jurisdictional threshold for one year requires examination of 1500 daily working histories (15 employees times 5 working days per week times 20 weeks). In a case like this one, in which the jurisdictional count was short, there would necessarily be a tabulation for the entire year of daily working histories -- a total of 3900 records (15 employees times 5 weekly working days times 52 weeks). In this case, for various additional reasons, the parties examined the work history of every employee for every day of the year, including

weekends -- approximately 5400 daily working histories.

All those figures are doubled because tabulation of two years of working history will often be required. In fact, in this case, respondents did a two year analysis -- 1989 and 1990 -- and produced their own spreadsheet weekly tabulations for both years, tabulations that proved to be significantly incorrect. (*See* discussion supra, notes 4 & 5, pp. 6 & 8). Thus, respondents and their counsel were required to do their own detailed tabulations and then redo them all over again to reach the stipulations. Surely that repetitious work and the resulting delays and expense were as undesirable for respondents as they were for petitioners and the district court.

Moreover, the detailed analysis required by the day-by-day method involves a series of complicated and sometimes raw and indecipherable records -- time cards, payroll sheets, and sick leave and vacation records.

Finally, even though the analysis was undertaken by agreement of counsel working together to produce usable stipulations for the district court, the effort still took almost ten months, from the August 13, 1993 filing of Metropolitan's Motion to Dismiss until the June 6, 1994 filing of the Stipulations. (*See* Dist. Ct. Dkt. Entries Nos. 25 & 37, JA 2 & 4-5). The parties repeatedly requested and were granted extensions of time by the district court. (*See* Dist. Ct. Dkt. Entries Nos. 32-36, JA 3-4). Had the parties contested the jurisdictional count, thus requiring the trial court's resolution of factual issues about daily work histories, the case would no doubt have been delayed even longer perhaps embroiling the district court in an agonizing and overwhelming counting exercise. With the increasing caseloads in the EEOC and federal courts, the imposition of such inordinate analysis is unwise in the extreme.

A line must be drawn somewhere. Some sort of test or method of counting must be devised. The payroll test is the obvious choice because it fulfills the clear legislative purpose of maximizing Title VII's protections in an inexpensive, swift procedure that is easy to apply.

c. The day-by-day method imposes greater costs on respondent employers because of the fee shifting provisions of Title VII.

Moreover, in some percentage of the cases, it will be the employer defendants who will bear the total burden of inordinate cost.

Prevailing plaintiffs are entitled to recover attorneys' fees and costs from defendants in all but special circumstances, whereas a prevailing defendant only recovers fees if the Title VII plaintiff's action was frivolous, unreasonable or without foundation or brought in bad faith. 42 U.S.C. § 2000e-5(k); *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 423 (1978). Thus, in those cases where jurisdiction is found and the plaintiff prevails on the merits, a defendant will pay the plaintiff's fees incurred in establishing that jurisdiction, whereas a prevailing defendant will be required to meet more stringent standards to win fees from a losing plaintiff. *Compare Pedreyra*, 465 F. Supp. at 952 (plaintiff establishing jurisdiction and discrimination entitled to attorneys fees), *with Evans v. Davie Truckers, Inc.*, 769 F.2d at 1014 (affirming refusal to award fees to defendant who won on merits after being found to be an employer).

Of course, respondent employers would no doubt prefer to escape a Title VII action on jurisdictional grounds rather than litigate on the merits. But surely respondent employers desire

an efficient and inexpensive method of determining whether or not they are covered by Title VII in the first place, and whether they are within the jurisdiction of the EEOC and federal courts in the second. But most assuredly, respondent employer do not want to lose an expensive and protracted jurisdictional inquiry, only to pay the costs and fees incurred by the plaintiff in that inquiry when and if the plaintiff thereafter prevails on the merits.

Thus, the day-by-day test results in an unbalanced apportionment of costs, a totally undesirable consequence from the defendant's perspective, a consequence that does not exist under the easy and swift payroll method.

6. The day-by-day method unsettles the construction of closely related anti-discrimination schemes which contain precisely the same phrase "for each working day."

As noted above, the phrase "for each working day" is contained in three other federal anti-discrimination statutes. ADEA, 29 U.S.C. § 630(b) (1988 & Supp. V 1993) (Pet. App. 24a), FMLA, 29 U.S.C. § 2611(4)(A)(i) (Supp. V 1993) (Pet. App. 28a), and ADA, 42 U.S.C. § 12111(5)(A) (Supp. V 1993). *See* discussion *supra*, pp. 16-17.

In the case of the FMLA, the most recently enacted of those statutes, Congress explicitly stated its intention that "for each working day" be construed under the payroll method. Both the House and Senate Committee Reports quote the "for each working day" language from Title VII, and then explain that as included in the FMLA the phrase "is intended to mean 'employ' in the sense of maintain on the payroll." House Committee on Education and Labor, Family and Medical Leave

Act of 1993, H.R. Rep. No. 8, pt. 1, 103d Cong., 1st Sess. at 33 (1993); and S. Rep. 103-3, 103d Cong., 1st Sess. at 21-22 (1993) *reprinted in* 1993 U.S.C.C.A.N. 23-24.

Moreover, the Department of Labor has explicitly included that method in its regulations implementing the FMLA: "Any employee whose name appears on the employer's payroll will be considered employed each working day of the calendar week, and must be counted whether or not any compensation is received for the week." Final Regulations Implementing Family and Medical Leave Act, 60 Fed. Reg. 2179, 2240 (1995) (to be codified at 29 C.F.R. Part 825, § 825.105(b)). (Supp. Pet. App. 1a-2a) As noted above, those regulations also explicitly recognize midweek employment changes as reflective of the payroll method. (*See* Argument Section 2.c *supra* p. 24-25).

It is difficult to see how the courts could construe the FMLA under the day-by-day method given its explicit legislative history and administrative construction. If Title VII is construed in this case under the day-by-day method, the lower courts, the EEOC, employees and employers will be faced with a senseless difference between identical statutory definitions in closely related anti-discrimination schemes.

The court of appeals refused to deal with this looming conflict on the grounds that while subsequent Congressional action can justify abandoning statutory precedent, the FMLA legislative history was just that -- legislative history -- and was "not akin to legislative action," and because the FMLA was not involved in this case. 60 F.3d at 1228-30 (Pet. App. at 8a-9a & 11a).

That rationale is wholly unsatisfactory. It is difficult to understand how Congress could have taken any other course in

enacting the FMLA. Congress obviously concluded that the phrase "for each working day" required the payroll method of implementation. It said so in its Reports. Had it altered that phrase in the FMLA, for example, to specify that it applied "to all employees on the payroll irrespective of their presence at work," that change would have been construed as a concession that Title VII and the ADEA did not require the payroll method because that additional clarifying language is not in those statutes. Thus, Congress chose the only principled method of ensuring uniformity of construction of identical language in similar statutory schemes -- clarification in the legislative history.

"[A] principle of statutory construction can endure just so many legislative revisitations . . . ." *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992). Where subsequent developments in the law -- either through the growth of judicial doctrine or further action by Congress -- have removed or weakened the conceptual underpinnings of a prior rule, or rendered it irreconcilable with competing legal doctrines or policies, its abandonment is fully justified. *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989).

All those factors are present here: There is a strong line of court decisions adopting the payroll method; Congress has explicitly approved that method in a subsequent act; and the adoption of the day-by-day would drastically unsettle the construction of other statutory schemes with consequent confusion for all touched by those schemes. Simply by adopting the payroll method, this Court can bring "coherence and consistency" to this important area of the law, avoiding

future complications arising from statutory conflict.[11] *Id.*

7. The day-by-day method strongly detracts from Title VII's purpose of extending the prohibitions against employment discrimination as far as possible.

Finally, petitioner respectfully submits that the day-by-day method is contrary to the Congressional purpose of extending the prohibitions against employment discrimination as far as possible. That purpose rings out clearly from the text of the statute's prohibitions, discussed above, as well as from the 1964 Senate debates preceding Title VII's enactment (*See* Argument, Section 3, *supra*, p. 31-38), and from the 1972 reduction of the employee minimum to fifteen. (*See* Argument, Section 3.b, *supra*, p. 31-32 and accompanying note 9). This Court affirmed that purpose in a slightly different statutory context in *Griggs v. Duke Power Co.* 401 U.S. 424, 429-30 (1970) (Objective of Congress in enacting Title VII is plain from the language of the statute -- to achieve equality of employment opportunity and remove barriers based on impermissible categories.).

Three of the persuasive lower court decisions adopting the payroll method stress that as remedial legislation, Title VII

---

[11] The distracting potential for cases presenting the construction of the phrase is typified by this Court's visitation and revisitation of the task of defining the term "employee" in other federal statutes. *Compare Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992) (ERISA); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) (Copyright Act); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944) (National Labor Relations Act). *See also Holly Farms Corp. v. NLRB*, 64 U.S.L.W. 4269 (April 23, 1996) (National Labor Relations Act).

should be given the broadest possible interpretation consistent with its humanitarian purpose. *Thurber*, 717 F.2d at 634-35; *Pedreyra*, 465 F. Supp. at 941; and *Pascutoi*, 11 FEP Cases at 1326-27. *See also Gomez v. Toledo*, 446 U.S. 635, 639 (1980) (Remedial civil rights laws should be construed generously to further their primary purpose.) Yet, the day-by-day method substantially derogates that purpose by limiting the reach of Title VII's prohibitions.

This case involves allegations that Ms. Walters was denied a promotion because of her gender -- a serious charge to be sure. But even graver is the charge that respondents fired Ms. Walters in retaliation for her original EEOC filing of that discrimination charge. The day-by-day method provides the escape route from responsibility for those serious charges, frustrating Title VII's overriding purpose. To combat such shenanigans in the workplace, the reach of Title VII should be extended as far as possible.

In *EEOC v. Commercial Office Products Co.*, another Title VII case, this Court held that it "need not and should not countenance" " 'absurd or futile results . . . 'plainly at variance with the policy of the legislation as a whole' " 486 U.S. 107, 120-21 (1988) (quoting in part *United States v. American Trucking Assns.*, 310 U.S. 534, 543 (1940) and *Ozawa v. United States*, 260 U.S. 178, 194 (1922)). That longstanding canon of construction should apply here as well. The day-by-day method's absurd and futile results are plainly a variance with Title VII's policy and should not be countenanced.

8. Petitioner Walters adopts the deference arguments of petitioner EEOC.

Finally, petitioner Darlene Walters urges the Court to follow the arguments of the EEOC requiring judicial deference to the EEOC's interpretation of Section 701(b), and adopts those arguments as her own.

CONCLUSION

Petitioner Darlene Walters respectfully asks this Court to reverse the judgement of the Seventh Circuit, to find that Metropolitan was an employer within the meaning of Section 701(b) of the Title VII of the Civil Rights Act of 1964, and to remand this case to the lower courts for full proceedings on the merits.

Respectfully submitted,

CONSTANTINE JOHN GEKAS
Counsel of Record
ADRIANNE S. HARVITT
ALENNA K. BOLIN
HARVITT & GEKAS, LTD.
SUITE 2600
135 SOUTH LA SALLE STREET
CHICAGO, ILLINOIS 60603
(312) 726-4501

MAY, 1996